UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MICHAEL AUSTIN,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-156-B-W***
	)	
JO ANNE B. BARNHART,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeals contends that the administrative law judge committed an error requiring remand when he failed to order a consultative psychiatric examination of the plaintiff. I recommend that the commissioner's decision be affirmed.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520. *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff suffered from hypertension under good control, elevated cholesterol under good control and a musculoskeletal impairment of unknown etiology, impairments that were severe but which did not, either alone or in combination, meet or medically equal any listed in

[1] This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The care is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on August 20, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the (*continued on next page*)

Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the "Listings"), Findings 4 & 6, Record at 29; that his residual functional capacity was limited to work at the light exertional level, further limited to performing no overhead lifting or repetitive reaching, handling or fingering with his left upper extremity, Finding 9, *id*.; that his allegations regarding his pain, symptomatology and functional limitations were not fully credible and that he did not suffer from impairments that could reasonably be expected to produce the pain and functional limitations of which he complained, Finding 10, *id*.; that his impairments prevented him from returning to his past relevant work, Finding 11, *id*.; that, given his age (39 at the time of the decision), education (high school) and residual functional capacity, use of section 202.20 of Appendix 2 to Subpart P, 20 C.F.R. Part 404 (the "Grid") as a framework for decision making resulted in a finding that there existed in the national economy a significant number of jobs at the light and sedentary exertional levels that the plaintiff could be expected to perform, Findings 7-9 & 12, *id*. at 29-30; and that the plaintiff therefore had not been under a disability, as that term is defined in the Social Security Act, at any time since the relevant date of December 4, 2000, Findings 1 & 13, *id*. at 28, 30. The Appeals Council declined to review the decision, *id*. at 4-5, making it the final determination of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn.

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administrative record.

Richardson v. Perales, 402 U.S. 389, 401 (1971; *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential evaluation process. At Step 5, the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. § 404.1520(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual functional capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

Discussion

The plaintiff contends that the administrative law judge was required to order a consultative psychological examination of him, as requested by his representative at the hearing, Record at 38 ("I would feel comfortable with a psychological CE") & 52 ("I suggested that a psych CE might be useful"), because "none of the treating or examining physicians could find a physical cause for the Plaintiff's ongoing complaints" and the administrative law judge should therefore have considered whether the plaintiff was suffering from a somatoform disorder, as defined at section 12.07 of the Listings. Plaintiff's Itemized Statement of Specific Errors ("Itemized Statement") (Docket No. 11) at 5-6. A consultative examination was required in order to test this possibility, the plaintiff asserts, relying on the commissioner's regulatory duty to develop an adequate record. *Id.*[2] The administrative law judge noted, Record at 24, that the physician who performed the post-hearing consultative physical examination of the plaintiff agreed with the

[2] At the hearing, the administrative law judge said, "I'm not going to go with a psych eval at this time. . . . [W]e'll do the EMG of the lumbar spine . . . [a]nd an orthopedic exam with a residual functional capacity statement. Then we'll see what . . . we're lacking and go from there." Record at 54-55. The written decision does not mention the possibility of such a consultative examination.

conclusion of a psychological examiner who reported two years earlier that "[i]t is likely that psychological factors contribute to [the plaintiff's] level of physical discomfort," *id*. at 230, but made no further reference to any possible psychological impairment. The report of the earlier examiner is not in the record. The record does contain two psychological evaluations performed by non-examining state-agency psychologists, *id*. at 181-94 & 203-16, both of whom reviewed the same report from 2000, *id*. at 193, 215, and neither of whom found a somatoform disorder to be present, although that disorder is one of many specifically listed on the forms completed by those reviewers, *id*. at 181, 203.

The regulation cited by the plaintiff, Itemized Statement at 5, provides as follows, in relevant part: "If your medical sources cannot or will not give us sufficient medical evidence about your impairment for us to determine whether you are disabled . . ., we may ask you to have one or more physical or mental examinations or tests." 20 C.F.R. § 404.1517. In the only case cited by the plaintiff, the First Circuit held that where the only medical evidence before the administrative law judge on a particular impairment is insufficient to support a conclusion that the plaintiff is not disabled by that impairment, remand is required. *Carrillo Marin v. Secretary of Health & Human Servs.*, 758 F.2d 14, 16 (1st Cir. 1985). The First Circuit also suggested that, "if the [commissioner] is doubtful as to the severity of [the plaintiff's] disorder the appropriate course is to request a consultative examination." *Id*. at 17. The decision did not hold that a consultative examination was required in that (or any) case in order to create an adequate record.

Here, nothing in the record suggests that the administrative law judge was doubtful as to the severity of the plaintiff's physical impairments, and the medical evidence supports his conclusions. Both of the state-agency psychologists who reviewed the report of a psychological evaluation mentioned by the physician who conducted a consultative examination of the plaintiff concluded that he did not suffer from a severe psychological impairment, even though they were specifically given the option of concluding that a

somatoform disorder, the disorder from which the plaintiff now suggests he might suffer, was present. Remanding for a consultative psychological examination in this case would be the equivalent of requiring such an examination whenever the commissioner finds that there is insufficient medical evidence to support the degree of pain or other limitations reported by the claimant. Such a requirement would apply to the majority of claims that have reached this court over the years. It is simply too broad.[3]

It is a matter within the commissioner's discretion whether to order a particular consultative examination. *Foster v. Halter*, 279 F.3d 348, 355-56 (6th Cir. 2001); *Wren v. Sullivan*, 925 F.2d 123, 128 (5th Cir. 1991). The courts will not disturb an exercise of that discretion unless it is shown that such an evaluation was necessary to reach an informed decision. *Foster*, 279 F.3d at 355; *Carillo Marin*, 758 F.2d at 17. In this case, the presence of the state-agency psychological evaluations means that such an evaluation was not necessary.

Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum,

[3] At oral argument, counsel for the plaintiff cited *Tolbert v. Apfel*, 106 F.Supp.2d 1217 (N.D.Okla. 2000), referring specifically to its observation that "[i]n somatoform cases, ALJ's are required to make incredibly delicate credibility assessments in order to choose between two equally possible scenarios: either the claimant is suffering from a legitimate mental impairment, or the claimant is suffering from physical symptoms which are consciously being exaggerated in an effort to acquire disability benefits," *id*. at 1225. However, in *Tolbert*, one of the claimant's physicians had diagnosed a somatoform disorder, *id*. at 1223, and the quoted language refers to cases "where somatic dysfunction is the dominant theme," *id*. at 1224. The case does not provide support for the contention that an administrative law judge must refer a claimant for a consultative psychological examination when he or she finds that the claimant's alleged degree of physical limitation is not supported by the medical evidence in the record and there is one entry in the medical records suggesting exaggeration of symptoms, which is the case here.

within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 25th day of August, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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